COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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Fitchburg Gas and Electric Light Company) D.T.E. 99-118

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THE ATTORNEY GENERAL'S OPPOSITION TO FITCHBURG GAS AND ELECTRIC LIGHT COMPANY'S MOTION TO DISMISS AND CROSS MOTION FOR LEAVE TO AMEND THE COMPLAINT

Pursuant to 220 CMR 1.04(1)(b) and Mass. R. Civ. P. 12(b)(6), the Attorney General of Massachusetts, Thomas Reilly, opposes the motion to dismiss filed by Fitchburg Gas and Electric Light Company ("Fitchburg" or "Company"). According to long standing precedent of both the Department of Telecommunications and Energy ("Department") and the courts of the Commonwealth, the Attorney General has appropriately plead a complaint for relief against Fitchburg. Although the Attorney General filed the complaint in a proper and timely fashion on December 31, 1999, the Department did not act on the matter until recently. Should the Department now suspect pleading defects in the complaint due to the lapse of time since it was filed, as the Company argues, then in the interests of fairness and justice the Attorney General requests leave to file an amended complaint pursuant to 220 CMR 1.04(3).

I. INTRODUCTION.

A. Procedural History.

On December 31, 1999, the Attorney General filed a complaint pursuant Mass. Gen. L. Ch. 164, § 93, against Fitchburg seeking to reduce rates for consumers who are electric utility ratepayers of Fitchburg. For the Department's convenience, a copy of this complaint is attached as Exhibit A. The complaint sought two forms of relief: 1) that the Department initiate an investigation, under Mass. Gen. L. Ch. 164, § 93, of the Company's electric distribution rates; and 2) that the Department designate a hearing officer for this investigation and schedule an initial conference with all interested parties as soon as possible. Ten months later, by notice date November 15, 2000, the Department scheduled a public hearing on the complaint for Thursday, December 14, 2000, in Fitchburg, Massachusetts. A procedural conference was held on December 19, 2000.

On January 5, 2001, the Hearing Officer issued a memorandum that required the Company to file an Answer by January 16, 2001, commenced the discovery period, set deadlines for the submission of pre-filed testimony and briefing and scheduled evidentiary hearings for April 2-3, 2001. The Attorney General initiated discovery, and on January 17, 2001, received a copy of the Company's motion to "dismiss" accompanied by a proposed answer should the attempted dismissal fail. On January 18, 2001, the Company filed a motion to define the scope of the proceedings. As explained fully below, the Attorney General opposes the motion to dismiss.

II. STANDARD OF REVIEW.

A. Complaint Allegations Are Accepted As True And All Inferences Are Drawn In The Plaintiff's Favor.

"In making its determination on whether to grant a motion to dismiss, the Department in reviewing the filing and pleadings must take the facts included in the filing and pleadings as true and viewed most favorably to the non-moving party." Stow Municipal Light v Hudson, D.P.U. 93-124-A at 4-5 (1993). The burden on the party moving for dismissal of a complaint is indeed a heavy one. *See* Gibbs Ford, Inc. v. United Truck Leasing Corp.,

399 Mass. 8, 13, 502 N.E.2d 508 (1987). The allegations of the Attorney General's "complaint (and annexed exhibits), as well as such inferences that may be drawn therefrom in the plaintiff's favor, are to be taken as true." Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 87, 390 N.E. 2d 243 (1979) *quoting* Nader v. Citron, 372 Mass. 96, 98, 360 N.E.2d 870 (1977). The Department's regulations prescribe the form for complaints. These regulations require that a plaintiff's pleading "shall" contain nothing more than the following:

1) A title which indicates the nature of the of the proceedings or the parties involved therein; 2) The complete name and address of the party filing the pleading; 3) If the party filing the pleading is represented by counsel, the name and address of the attorney; 4) The name and address of all other petitioners; 5) A clear and concise statement of the facts upon which the pleading is maintained; 6) In the case of appellate proceedings, a clear and concise statement of the appellant's objections to the decision or action from which the appeal is taken; 7) A reference to the statute under which relief is sought; 8) A prayer setting forth the relief sought; and 9) As part of the initial petition pursuant to M.G.L. c. 164, § 9; M.G.L. c. §§ 19, 20, the company shall file a copy of the proposed notice as set forth in 220 CMR 5.06 and a list of newspapers in which it proposes to publish such notice.

220 CMR 1.04(b)(1)-(9). In evaluating the legal sufficiency of a complaint in the face of a motion to dismiss, the Department has explicitly adopted the standards used by the courts under Mass. R. Civ. P. 12(b)(6):

The Department's current standard for ruling on a motion to dismiss for failure to state a claim upon which relief can be granted is applicable to the instant Motion to Dismiss and Motion for Hearing of the Motion to Dismiss. In Riverside Steam & Electric Company, D.P.U. 89-123, at 26-27 (1988), the Department denied the respondent's motion to dismiss, finding that it did not "appear[] beyond doubt that [the petitioner] could prove no set of facts in support of its petition," and, in doing so, adopted the traditional Rule 12(b)(6) civil standard. Id., see Mass. R. Civ. P. Rule 12(b)(6); see also Nader v. Citron, 372 Mass. 96, 98 (1988).

Stow Municipal Light v Hudson, D.P.U. 93-124-A at 4-5. The Department can grant a motion to dismiss only if "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the] claim which would entitle him to relief." Nader v. Citron, 372 Mass. at 98, 360 N.E.2d 870 *quoting* Conley v. Gibson, 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

B. A Complaint Must Be Sustained If A Plaintiff Is Entitled To Relief Under Any Theory Of Law.

"[A] complaint is sufficient against a motion to dismiss if it appears that the plaintiff may be entitled to any form of relief, even though the particular relief he has demanded and the theory on which he seems to rely may not be appropriate." Nader v. Citron, 372 Mass. at 104, 360 N.E.2d 870. A complaint is not subject to dismissal if it would support relief on any theory of law. Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. at 89, 390 N.E. 2d 243. All that a plaintiff need do to resist a motion to dismiss is present a complaint that does no more than "sketch [ ] the bare silhouette of a cause of action." Coolidge Bank & Trust Co. v. First Ipswich Co., 9 Mass.App. Ct. 369, 371, 401 N.E.2d 165 (1980).

C. Oral Representations And Extraneous Materials Are Not Consider In A Motion To Dismiss.

In evaluating a complaint for purposes of a motion to dismiss, the court will look at the four corners of the complaint as well as any documents that are incorporated by reference and attached to the complaint, but ***not*** "oral representations and extraneous materials not incorporated by reference" into the complaint. Mmoe v. Commonwealth, 393 Mass. 617, 620, 473 N.E. 2d 169 (1985) ("Pleadings must stand or fall on their own"). The plaintiff's claim must be based on facts set forth in the complaint and all materials outside the pleadings are excluded from this review. General Motors Acceptance Corp. v. Abington Cas. Ins. Co., 413 Mass. 583, 584, 602 N.E.2d 1085 (1992).

III. ARGUMENT.

A. The Attorney General Has Plead Sufficient Facts Establishing A Claim For Relief.

In the motion to dismiss the Company devotes considerable argument to numerous issues it believes the Attorney General did not adequately address in his complaint, like the prospective nature of rates, burdens of proof, appropriate rate of return, etc. (Fitchburg's motion to dismiss, pp. 11-15). Contrary to the implication of the Company's prolix arguments, however, the allegations in the Attorney General's complaint are uncomplicated, direct and entitle consumers to relief. (Complaint at ¶¶ 1-9).

The requirements to pleading a claim under § 93 are relatively simple. The statute, in full, reads as follows:

On written complaint of the attorney general, of the mayor of a city or the selectmen of a town where a gas or electric company is operated, or of twenty customers thereof, either as to the quality or price of the gas or electricity sold and delivered, the department shall notify said company by leaving at its office a copy of such complaint, and shall thereupon, after notice, give a public hearing to such complainant and said company, and after such hearing may order any reduction or change in the price or prices of gas or electricity or an improvement in the quality thereof, and a report of such proceedings and the result thereof shall be included in the report required by section seventy-seven. Such an order may likewise be made by the department, after notice and hearing as aforesaid, upon its own motion. The price or prices fixed by any such order shall not thereafter be changed by said company except as provided in section ninety-four.

Mass. Gen. L. Ch. 164, § 93. Thus, to properly institute a proceeding under § 93, the Attorney General need only file a "written complaint" with the Department "either as to the quality or price of the gas or electricity sold and delivered." Id. These requirements have clearly been plead, *see* Complaint, ¶ 1, 7-9, and attachment A. Since these allegations and the associated attachment must be accepted at face value as true and construed to favor the Attorney General's position, it can fairly be said that a claim under Mass. Gen. L. Ch. 164, § 93 has been alleged. The Company laboriously argues its opinion as to whether the Attorney General may ultimately prove its case, the appropriate form of relief or and whether the complaint can be fairly characterized as presenting a "single issue" rate case.[(1)] Such an inquiry is premature at this juncture. There is no requirement in § 93 that the Attorney General must plead and prove in his initial complaint the countless facts germane to a rate case, as the Company argues at length. As made clear by the numerous cases cited in section II above, a complaint need not address issues of proof of facts alleged. In any event, however, from the facts that were alleged, it can reasonably be inferred that consumers are entitled to rate relief. Such inferences must be drawn in favor of the Attorney General under the controlling standard of review..

Furthermore, the relevant provisions of 220 CMR 1.04(1)(b)(1)-(9) have been fulfilled. The Attorney General's complaint contains: a) a title which indicates the nature of the of the proceedings or the parties involved therein (Complaint, ¶¶ 1, 4-5); b) the complete name and address of the party filing the pleading (Complaint at signature line); c) the name and address of the filing attorney (Complaint at signature line); d) a clear and concise statement of the facts upon which the pleading is maintained (Complaint at ¶¶ 1-9); e) a reference to the statute under which relief is sough (Complaint at ¶1); and, f) a prayer setting forth the relief sought (Complaint at "Wherefore" clause). The Attorney General's complaint easily satisfies these requirements, and, consequently withstands Fitchburg's motion to dismiss.

B. Information Outside The Complaint Must Not Be Considered In A Motion To Dismiss.

It is well settled law that the plaintiff's claim must be based on facts set forth in the complaint and all materials outside the pleadings are excluded from this review. General Motors Acceptance Corp. v. Abington Cas. Ins. Co., 413 Mass. at 584, 602 N.E.2d 1085. Oral statements and extraneous materials are not to be considered. Mmoe v. Commonwealth, 393 Mass. at 620, 473 N.E. 2d 169. Despite this prohibition, the Company, for some reason, devotes a considerable portion of its motion to quoting unsworn, oral representations of one of its own employees from the scheduling conference as background to launch its attacks against the Attorney General's complaint. *See* "Summary of Complaint and Responses," Fitchburg's motion to dismiss, pp. 3- 6. The Company similarly errs in its analysis by quoting the oral statements of an Assistant Attorney General and a letter written to the Department as a way of inappropriately modifying the Attorney General's written prayer for relief as contained in the complaint. Therefore, the arguments in Fitchburg's motion regarding *prima facie* evidence (Fitchburg's motion to dismiss, p. 7) and the oral request for interim or emergency rate relief (Fitchburg's motion to dismiss, pp. 13-15) are simply irrelevant for purposes of a motion to dismiss since these issues come from outside the pleadings. Under the controlling standards of review, the Department must look only to the "four corners" of the complaint to evaluate whether a request for relief has been properly plead.

C. Chapter 164, § 93, Applies To Fitchburg's Operations After The Enactment Of The Restructuring Laws.

The Company has raised the issue of the proper interpretation of Chapter 164, § 93 after the enactment of the 1997 restructuring laws. (Fitchburg's motion to dismiss, pp. 15-17). "Provisions of legislation addressing similar subject matter are to be construed together to make an harmonious whole consistent with the legislative purpose, and to avoid rendering any part of the legislation meaningless." Healey v. Commissioner of Public Welfare, 414 Mass. 18, 26, 605 N.E.2d 279 (Mass. 1992) (citations omitted). Individual statutory provisions related to the same general area must be read "as a whole . . . to the end that, as far as possible, the (entire legislative program) will constitute a consistent and harmonious whole." Haines v. Town Manager of Mansfield, 320 Mass. 140, 142, 68 N.E.2d 1, 3 (1946). The Department should assume that the legislature was aware of all existing statutes when it enacted the subsequent law, Hadley v. Amherst, 372 Mass. 46, 51, 360 N.E.2d 623 (1977), and that an implied repeal of one statute by the subsequent enactment should be found only "when the prior statute is so repugnant to, and inconsistent with, the later enactment that both cannot stand." Boston v. Board of Education, 392 Mass. 788, 792, 467 N.E.2d 1318 (1984) (citations omitted). An implied repeal of a statute is disfavored by the law. Dedham Water Co. v. Dedham, 395 Mass. 510, 518, 480 N.E.2d 1016 (1985). In construing a statute the Department should be guided by the principle that "(i)t is not to be lightly supposed that radical changes in the law were intended where not plainly expressed." Ferullo's Case, 331 Mass. 635, 637, 121 N.E.2d 858, 859 (1954).

The Company argues, in essence, that after restructuring § 93 should no longer apply to the rates of utilities like Fitchburg. (Fitchburg's motion to dismiss, pp. 15-17). The Company reasons that the pre-restructuring statute speaks in terms of "the price of . . . electricity" alone and after restructuring Fitchburg no long engages in the generation, supply or sale of "electricity," but rather charges for "distribution." (Id.) [(2)] This position would effectively and silently repeal § 93, since the "generators" of electricity, the entities under Fitchburg's logic that should be subject to the statute post-restructuring, are generally understood no longer to come under the Department's jurisdiction. The Company's interpretation plainly runs contrary to the announced purpose of the restructuring laws. The Department should interpret the restructuring enactments to be harmonious and consistent with the whole statutory system found in Chapter 164, rather than interpret the enactments in a way that radically changes a longstanding provision of the law that itself was not amended or repealed by the Legislature. Section 93 has always applied to any aspect of a company's operations that led to unreasonable prices of electricity sold and delivered and the only reasonable interpretation is to continue to apply § 93 to those activities over which the Department has retained jurisdiction in the new statutory system.

IV. CONCLUSION.

Under the controlling authorities regarding motions to dismiss and the requirement of Mass. Gen. L. Ch. 164, § 93, the Attorney General's complaint has been properly plead. Consequently, the Company's motion should be denied.

Wherefore: The Attorney General requests that Fitchburg's motion to dismiss the complaint be denied.

In the alternative, the Attorney General requests leave to amend to the complaint.

RESPECTFULLY SUBMITTED,

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1. Fitchburg has raised the issue that the Attorney General has presented a "single issue" rate case. As to the issue of a single issue rate case, the Attorney General notes § 93 plainly and expressly authorizes the filing of a complaint regarding the single issues of "price" and "quality." Mass. Gen. L. Ch. 164, § 93. Since the question of the "justness" and "reasonableness" of particular rates can fairly be reduced to a question involving the level of profits produced by a company's earnings on its regulated operations at a particular time and in particular circumstances, the Company's objection appears to be that the Attorney General's complaint concerns only the reasonableness of its rates. There is, however, no merit to this argument. It should be plain that from the perspective of the need for a rate inquiry, the single issue raised by the level of the company's recent earnings --- whether its current rates are excessive --- does not fall within the rubric of the "single issues" proscribed by the Department as a basis for rate changes. *See, e.g.*, Cambridge Electric Light Co., D.P.U. 490 (1981).

2. In full relevant part, the statute permits the filing of a complaint "as to the quality or price of the gas or electricity sold and ***delivered***". Mass. Gen. L. Ch. 164, § 93 (emphasis added). Certainly the inclusion of the term "delivered" in the statute by the Legislature implies that the law was meant to cover the distribution aspects of a utility's business, as well as the price of the power itself.